

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JESSICA SCHROEDER, by and through her
guardian ad litem MARINA LANERI
SCHROEDER,

Plaintiff,

vs.

SAN DIEGO UNIFIED SCHOOL
DISTRICT; THE BOARD OF EDUCATION
OF THE SAN DIEGO UNIFIED SCHOOL
DISTRICT; KIMBERLY CHAMBERS,
individually and in her official capacity as a
special education teacher for the San Diego
Unified School District; MICHAEL
JIMENEZ, individually and in his official
capacity as a vice-principal for the San Diego
Unified School District; and SUE SKINNER,
individually and in her official capacity as a
school counselor for the San Diego Unified
School District,

Defendants.

CASE NO. 07cv1266-IEG(RBB)

Order Granting in Part and Denying in
Part Plaintiff's Motion to Strike;
Granting Motion to Approve
Compromise of Claim; Granting
Motion to Establish Special Needs
Trust [Doc. Nos. 135, 136, 137]

Plaintiff Jessica Schroeder, by and through her Guardian ad Litem Marina Schroeder,
moves the Court for an order (1) striking the attorneys' fees lien of former counsel Amy and Tom
Vandeveld, (2) approving the settlement of her claims against Defendants, and (3) establishing a
special needs trust for distribution of the settlement funds. The Vandevelds have filed an
opposition to the motion to strike the attorneys fees lien, and Plaintiff has filed a reply as to that

1 motion. The Court found the motions appropriate for submission on the papers and without oral
2 argument, and vacated the hearing date.

3 For the reasons set forth herein, the Court GRANTS IN PART AND DENIES IN PART
4 Plaintiff's motion to strike the Vandevelds' lien for attorneys fees and costs, and GRANTS
5 Plaintiff's motion for approval of the settlement and motion to establish a Special Needs Trust.

6 **Procedural History**

7 Plaintiff initially filed her complaint on July 12, 2007, alleging causes of action against the
8 San Diego Unified School District and teacher Kimberly Chambers under 42 U.S.C. § 1983, Title
9 II of the Americans with Disabilities Act, the California Unruh Civil Rights Act, and California
10 Civil Code § 51.9, as well as negligence. Plaintiff's mother, Marina Laneri Schroeder, asserted a
11 claim for intentional infliction of emotional distress against the District and Ms. Chambers.
12 Plaintiff also alleged a claim for battery against Fernando Ortiz, the student who sexually abused
13 her, and alleged Fernando's parents, Henry and Sylvia Ortiz, were vicariously liable for their son's
14 actions.

15 Defendants Fernando, Henry, and Sylvia Ortiz filed answers to the complaint on
16 September 14, 2007. Defendants, the District and Ms. Chambers, moved to dismiss the complaint
17 for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). By order filed November 26, 2007,
18 the Court denied Defendants' motion.

19 Plaintiff's original counsel, Amy and Thomas Vandeveld, withdrew from representation on
20 June 27, 2008, and new counsel substituted into the case on August 13, 2008. On November 11,
21 2008, Plaintiff moved the Court for leave to file an amended complaint. The Court granted that
22 motion and on February 5, 2009, Plaintiff filed her amended complaint. Plaintiff's amended
23 complaint deleted all claims against Fernando, Henry, and Sylvia Ortiz, and also deleted Marina
24 Laneri Schroeder's individual claim. Plaintiff added two new Defendants, Michael Jimenez and
25 Sue Skinner. Plaintiff deleted all of her claims under the ADA and California Civil Code, and
26 alleged only claims under § 1983 as well as negligence.

27 The Court denied Defendants' motion for summary adjudication of Plaintiff's claims under
28 § 1983. Prior to the Pretrial Conference, the parties reached a settlement of all Plaintiff's claims.

1 The parties have agreed to settle the entire case for the sum of \$400,000. Plaintiff's current
 2 counsel were retained based on a contingency fee agreement, under which they are entitled to one-
 3 third of the gross recovery plus litigation costs. Thus, current counsel is entitled to \$133,333.33 in
 4 fees and \$74,619.33 in litigation expenses. However, current counsel have agreed to accept a total
 5 of \$175,000 for all their fees and costs. With the payment of certain other expenses, Plaintiff will
 6 receive slightly less than \$220,000 in settlement of her claims.

7 **Factual Background**

8 At the time of the incident which is the subject of this lawsuit, the Spring of 2006, Jessica
 9 was an 18-year old severely mentally retarded young woman with the functional ability of a young
 10 child. [Amended Complaint, ¶ 3.] Jessica was a student in Kimberly Chambers' Integrated Life
 11 Skills ("ILS") class at Serra High School within the District. The purpose of this class is to teach
 12 students with a low level of mental functioning certain basic skills, such as buying groceries and
 13 riding the bus, so that they can function in society.

14 Fernando Ortiz was also a student at Serra High School, and was assigned to be a "peer
 15 tutor" in Ms. Chambers' classroom in the spring semester of 2006. Ortiz was in Ms. Chambers'
 16 room acting as a peer tutor on the afternoon of April 17, 2006 when he sexually assaulted Jessica.
 17 The abuse occurred while others, including Ms. Chambers, were in the room engaging in a
 18 bowling activity, and occurred off and on over a period of about 30 minutes. Information in
 19 Ortiz's background likely should have led school officials to recognize he could be a danger to
 20 those, like Jessica, who are particularly vulnerable to sexual abuse. Ortiz pled guilty to sexual
 21 assault as a result of the incident.

22 **Facts Underlying Counsel's Withdrawal from the Action**

23 Plaintiff's mother and guardian ad litem, Marina Schroeder, originally retained Amy
 24 Vandeveld on May 18, 2006, to represent their interests. The parties executed a written retainer
 25 agreement, providing that Ms. Vandeveld would receive a contingency fee in the amount of 40%
 26 of any recovery achieved after the "first Court Conference or hearing in this Action." [Plaintiff's
 27 Motion to Strike, Exhibit A.] This action was filed in federal court on July 13, 2007. The parties
 28 entered into a revised fee agreement on December 17, 2007, explicitly providing that Thomas

1 Vandeveld could be associated as counsel to work on the case and share in any fees. [Vandevelds'
2 Opposition to Motion to Strike, Exhibit 15.]

3 In June of 2008, a conflict developed between Marina Schroeder and the Vandevelds. The
4 Vandevelds questioned Marina's honesty based upon several discrepancies between what Marina
5 told them about Jessica's behavior and information reflected in the medical records. In particular,
6 the Vandevelds began to question Marina closely about her claims that Jessica's behavior changed
7 dramatically after the sexual assault. Marina told the Vandevelds that before the assault Jessica
8 was "loving and affectionate" and not aggressive. However, a review of Jessica's medical records
9 revealed numerous references to Jessica's aggression toward her sister and mother before the
10 incident. In addition, although Marina told the Vandevelds that Jessica was unable to sleep and
11 began wandering around the house after the assault, the medical records made several references
12 to Jessica wandering the house during the night, commenting that chimes had been put on Jessica's
13 door because of this problem as many as two years before the assault. The Vandevelds also
14 believed Marina had been dishonest about whether there was a man living in the home, about
15 whether Jessica's treating neurologist, Dr. Grossman, would support Plaintiff's claim regarding
16 changes in behavior, and about the legal status of workers who helped Marina with Jessica's in-
17 home care.

18 To address all of these issues, the Vandevelds met with Marina on June 9, 2008.
19 Following that meeting, Marina sent Amy Vandeveld an email addressing the alleged discrepancy
20 as to whether or not there was a man living in her house. In that email, Marina noted The meeting
21 today has left me very unsettled. Instead of finding solutions to the problems that are arising all
22 you have done is to doubt my credibility by assuming I am lying to you in regards to a stepfather
23 in the house.... I have left the meeting today with an overwhelming feeling of doom, which I find
24 inconceivable as we are supposed to work together in giving my daughter a voice.

25 [Vandevelds' Opposition to Motion to Strike, Exhibit 5.]

26 Amy responded by email on June 11, 2008, reiterating her belief that Marina was not being
27 honest, particularly with regard to a man living in the home and Jessica's behavior before and after
28 the incident as reflected in the records of Dr. Grossman:

I would like to continue representing you in this action, but I cannot do so if I feel that you are being untruthful with me and/or that your settlement position is unreasonable. ... LET ME BE VERY CLEAR. I EXPECT YOU TO TELL ME THE TRUTH AT ALL TIMES. EVEN IF THE TRUTH MAY NOT BE HELPFUL TO YOUR CASE. TESTIMONY AT DEPOSITION, STATEMENTS RESPONDING TO DISCOVERY, AND TRIAL TESTIMONY IS GIVEN UNDER PENALTY OF PERJURY. IF YOU ARE UNTRUTHFUL, YOU MAY BE FOUND BY A COURT TO HAVE COMMITTED PERJURY, WHICH IS A CRIME. IF I BELIEVE YOU HAVE PROVIDED FALSE TESTIMONY, I WILL IMMEDIATELY MOVE TO BE RELIEVED AS YOUR AND JESSICA'S ATTORNEY.

[Id., Exhibit 6 (emphasis in original).]

Marina responded by very lengthy email on the same date, the pertinent parts of which follow:

Amy, there cannot be a lawyer client relationship if you keep distrusting my statements. All you have done [sic] the other day is doubt my credibility, attack my character and find problems instead of solutions. ... I cannot believe that you doubted me instead of suggesting that the records could be rectified.

* * *

If you ask me, Dr. Grossman would look silly on the witness stand. Actually it doesn't even matter if she is more aggressive or not because of the attack Well, in my opinion, for the reasons mentioned herein, Dr. Grossman is the least qualified person to determine the outcome of the case. Her opinion can easily be challenged. This is where you and I differ, and this might have caused the breakdown in our communication.

* * *

It doesn't matter if she was quiet at Chadwick and aggressive at the doctor's office. It DOESN'T MATTER! She was violated, that's [sic] what matters!! I have no problems in continuing to work with you and I am truthful to you even though you think the contrary.

[Id., Exhibit 7.]

Several days later, on June 19, 2008, Amy told Marina they "need to speak regarding the status of this case and whether we can continue an attorney-client relationship. If we cannot, I will need to withdraw from this case." [Id., Exhibit 8.] Finally, on June 27, 2008, a disagreement arose between Amy and Marina regarding scheduling a meeting with Dr. Grossman. Marina accused Amy of lying about her attempts to schedule an appointment to meet with Dr. Grossman. [Plaintiff's Motion to Strike, Exhibit B.] Amy responded by email approximately 45 minutes later, disputing Marina's account of her communications with Dr. Grossman's office. The email concluded as follows:

I think it is in everyone's best interest for you to find another attorney. I am invoking the clause in our fee agreement that allows me to withdraw from representation of you and Jessica. Unless we receive a substitution of attorney form

1 for my execution no later than July 15, 2008, we will file a motion to withdraw.
 2 Good luck to you.

3 *Discussion*

4 *I. Motion to Enforce Attorneys Fees Lien*

5 The Vandevelds have asserted a lien against the settlement proceeds in the amount of
 6 \$119,494.63, which reflects \$84,337.50 in fees for Amy Vandeveld, \$1,854.63 in costs for Amy
 7 Vandeveld, and \$33,302.50 in fees for Thomas Vandeveld. Plaintiff argues the Court should strike
 8 the lien, and refuse to award the Vandevelds any fees or costs, because (a) counsel failed to advise
 9 Plaintiff of the potential conflict created by the lien clause and her right to seek the advice of
 10 independent counsel as required by Cal. R. Prof. Conduct. 3-300, and (b) counsel voluntarily
 11 withdrew from representing Plaintiff and thus are not entitled to fees pursuant to established
 12 California law.

13 *a. Is the lien clause valid?*

14 Plaintiffs originally retained the Vandevelds on a contingent fee basis. The fee agreement's
 15 lien provision, which the Vandevelds now seeks to enforce, provides : "Client agrees that Counsel,
 16 and any other attorneys associated into the Action, shall have a lien for services rendered and costs
 17 advanced on any sums recovered, whether by settlement, judgment or motion, regardless of
 18 whether the Agreement is terminated by the Client or by Counsel." [Plaintiff's Motion to Strike,
 19 Exhibit A, p. 5, ¶ VIII.] Plaintiff argues this clause is unenforceable, however, because counsel
 20 failed to comply with Rule 3-300 of the California Rules of Professional Conduct.

21 Rule 3-300 provides that an attorney must not act in a manner adverse to his or her client
 22 unless each of the following are satisfied:

23 (A) The transaction or acquisition and its terms are fair and
 24 reasonable to the client and are fully disclosed and transmitted in
 25 writing to the client in a manner which should reasonably have been
 understood by the client; and

26 (B) The client is advised in writing that the client may seek
 27 the advice of an independent lawyer of the client's choice and is
 given a reasonable opportunity to seek that advice; and

28 (C) The client thereafter consents in writing to the terms of
 the transaction or the terms of the acquisition.

1 This rule applies where an attorney seeks to obtain a lien interest in the client's property in order
 2 to secure payment the payment of fees, because a charging lien against a client's future judgment
 3 or recovery is "adverse to the client." Fletcher v. Davis, 33 Cal. 4th 61, 69 (2004). However, as
 4 the California Court of Appeal recently recognized, "[t]he inclusion of a charging lien in the initial
 5 contingency fee agreement does not create an 'adverse interest' to the client within the meaning of
 6 rule 3-300" Plummer v. Day/Eisenberg, LLP, ___ Cal. Rptr. 3d ___, 2010 WL 1645041 at *6
 7 (Apr. 26, 2010) (quoting State Bar Standing Com. on Prof. Responsibility & Conduct, Formal
 8 Opn. No. 2006-170, p. 7). Therefore, the Court concludes the Vandevelds have a valid lien by
 9 virtue of the clause included in the contingency fee agreement.

10 b. Did counsel withdraw voluntarily?

11 Plaintiff also argues the Vandevelds cannot enforce their lien for fees because the parties
 12 entered into a contingency fee agreement and counsel voluntarily withdrew from the case before
 13 Plaintiff received any recovery. In response, the Vandevelds argue they were required to withdraw
 14 from the case because Marina Schroeder refused to be truthful with them, creating a conflict
 15 between Marina and Jessica's interests. The Vandevelds also argue Marina's failure to be truth
 16 created a strong likelihood counsel would be used as a vehicle to present false information to the
 17 Court.

18 A California attorney retained solely on the basis of a contingency fee agreement may not
 19 voluntarily withdraw from representing a client and later seek fees for the reasonable value of
 20 services rendered. Estate of Falco v. Decker, 188 Cal. App. 3d 1004, 1014 (1987). The reason
 21 behind the bar is "the inequity of allowing lawyers to capitalize on their own voluntary actions in
 22 leaving clients lawyerless." Rus, Milband & Smith v. Conkle & Olesten, 113 Cal. App. 4th 656,
 23 675 (2004).

24 To allow an attorney under a contingency fee agreement to withdraw without
 25 compulsion and still seek fees from any future recovery is to shift the time, effort
 26 and risk of obtaining the recovery (economists would refer to these things as the
 "costs" of obtaining recovery) from the attorney, who originally agreed to bear
 those particular costs in the first place, to the client.

27 Id. at 675-76.

28 In order to obtain fees after withdrawing from a contingency fee representation, counsel

1 must show he or she had to withdraw for ethical reasons and, in fact, withdrew for that justifiable
 2 reason. Falco, 188 Cal. App. 3d at 1015. Under this heightened standard, in order to recover in
 3 quantum meruit after withdrawing from a representation based upon a contingency fee
 4 arrangement, an attorney must show the following:

5 (1) counsel's withdrawal was mandatory, not merely permissive, under statute or
 6 State Bar rules; (2) the overwhelming and primary motivation for counsel's
 7 withdrawal was the obligation to adhere to these ethical imperatives under statute or
 8 State Bar rules; (3) counsel commenced the action in good faith; (4) subsequent to
 counsel's withdrawal, the client obtained recovery; and (5) counsel has
 demonstrated that his work contributed in some measurable degree towards the
 client's ultimate recovery.

9 Id. at 1016. "While a personality clash between the parties may provide good reason for allowing
 10 the attorney to withdraw, it is not necessarily a justifiable reason for purposes of awarding fees."

11 Id. at 1014.

12 Here, the Vandevelds argue they had a mandatory obligation to withdraw under Rule 3-
 13 700(B)(2)¹ of the California Rules of Professional Conduct because Marina's "concocted damages
 14 claim" created "an irreconcilable conflict of interest between Marina's interests and Jessica's
 15 interests." In addition, the Vandevelds argue they had an ethical duty to the Court to make sure
 16 Marina was telling the truth, and would have been required to withdraw under Cal. Bus. & Prof.
 17 Code § 6068(d) if Marina attempted to present perjured testimony to the Court. Upon review,
 18 however, the Court doubts the Vandevelds were truly motivated to withdraw from this case for the
 19 ethical reasons they now cite. See Falco, 188 Cal. App. 3d at 1015 (warning courts to guard
 20 against attorneys who attempt to abandon their client under the guise of an ethical duty, hoping to
 21 later collect fees if the client eventually recovers through trial or settlement).

22 Before terminating the attorney-client relationship, the Vandevelds never told Plaintiffs
 23 they were withdrawing because of a conflict between Marina and Jessica's interests. Although the
 24 many emails attached to the Vandevelds' opposition show growing animosity between Amy and
 25 Marina, none of those emails counsel Marina about the potential conflict the Vandevelds now
 26 assert. The Vandevelds never suggested that Marina obtain separate counsel with regard to her
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28 ¹Rule 3-700(B)(2) provides that a member must withdraw from representing a client where "[t]he member knows or should know that continued employment will result in violation of these rules or of the State Bar Act."

1 claims, or that Marina seek another individual to act as Jessica's guardian ad litem. After they
2 withdrew from the litigation, the Vandevelds never suggested to Plaintiff or to new counsel that
3 there was a potential conflict between Marina and Jessica's interests requiring them to be
4 separately represented.

5 Even if the Vandevelds had an arguable need to withdraw for ethical reasons, the records
6 submitted to the Court demonstrate the overwhelming and primary reason behind counsel's
7 decision to withdraw from the attorney-client relationship was a personality clash leading to a
8 breakdown in communications. The Vandevelds questioned Marina's truthfulness, and Marina
9 questioned the Vandevelds' handling of the case. The emails between counsel and Plaintiff also
10 reveal an underlying dispute regarding the value of injuries Jessica suffered from the assault.
11 These disputes, and not the Vandevelds' now-asserted ethical concerns, appear to be the reason
12 why counsel withdrew from the case. Thus, the Vandevelds are not entitled to recover fees for
13 their legal services in this case and the Court GRANTS Plaintiff's motion to strike the
14 Vandevelds' attorney's fees lien.

15 Although the Vandevelds are not entitled to attorneys fees, the fee agreement required
16 Plaintiff to pay costs even if there was no recovery. [Motion to Strike, Exhibit A, p. 1.] Plaintiff
17 has not shown that California law precludes the Vandevelds from recovering such costs under the
18 circumstances in this case. Therefore, the Court DENIES Plaintiff's motion to strike the
19 Vandevelds' lien for costs.

20 2. Motion to Approve the Settlement

21 Pursuant to Civil L.R. 17.1, "[n]o action by or on behalf of a minor or incompetent will be
22 settled, ... without court order." Under California law, the court must approve the reasonableness
23 of expenses and attorneys fees paid for the benefit of a minor or person with a disability. Cal.
24 Prob. Code § 3601. Here, both the settlement and the provision for payment of fees to Plaintiff's
25 current counsel is fair and reasonable.

26 As indicated above, Defendants have agreed to pay \$400,000 in settlement of Plaintiff's
27 claims. Out of that amount, Plaintiff's counsel seeks \$175,000 in combined fees and costs. From
28 the remaining \$225,000, there are \$1,591.45 in medical expenses which must be paid, \$3,100 in

1 attorneys fees for the creation of the Special Needs Trust, and the \$1,854.63 in costs to Amy
2 Vandeveld. This would leave a final amount of \$218,456.92 to be paid to Plaintiff.

3 Liability and damages in this case were both highly disputed. The Court denied summary
4 adjudication on Plaintiff's § 1983 claims because there were material issues of fact as to whether
5 the Defendants affirmatively placed Jessica in a known or obvious dangerous position, and
6 whether they were deliberately indifferent to that known or obvious risk. Even assuming Plaintiff
7 could establish each of these elements, there were also substantial issues regarding the nature and
8 value of the injury Jessica suffered from the sexual assault. Plaintiff was prepared to present
9 evidence at trial that Jessica's behavior changed dramatically and negatively after the assault, such
10 that she would require extensive additional care for the remainder of her life. Defendants argued,
11 however, that Jessica's negative behaviors were an issue for many years prior to the assault, such
12 that any damages were minimal. In light of the numerous factual issues for trial, the Court finds
13 the proposed settlement to be fair and reasonable.

14 In addition, the fees sought by Plaintiff's counsel, Jeffrey Weeks of Weeks & Luchetta
15 LLP and David Poore of Kahn, Brown and Poore, LLC, are reasonable. Counsel took over this
16 case in August of 2008. They quickly moved to extend the pretrial deadlines and undertook to
17 conduct significant discovery which the Vandevelds did not do prior to their withdrawal from the
18 case. They amended the complaint to delete claims which were of little merit and value, and
19 focused instead on the § 1983 claim against the District and its employees. They worked with
20 experts to obtain opinions regarding the injury Jessica suffered, and the value of that injury. Their
21 work contributed significantly to the Plaintiff's favorable settlement of her claims against
22 Defendants. Under the attorneys' fee agreement, they are entitled to one-third of the gross
23 recovery, plus litigation expenses. However, counsel have agreed to reduce their fees and costs to
24 a total of \$175,000. The Court finds this amount of fees and costs is reasonable after considering
25 both the quality of counsel's work and the result achieved. Therefore, the Court GRANTS
26 Plaintiff's motion to approve the compromise of this action.

27 3. Motion to Establish Special Needs Trust

28 Finally, Plaintiff moves the Court for an order establishing a Special Needs Trust to


1 administer the settlement proceeds for Jessica's benefit. The procedure for approval of an
2 application to establish a Special Needs Trust is set forth in Civil L.R. 17.1. The Plaintiff's
3 motion contains all of the information required by the Local Rules, and also complies with Cal.
4 Probate Code §§ 3600, *et seq.* Therefore, the Court GRANTS Plaintiff's motion to establish a
5 Special Needs Trust and will enter a separate order as called for by Civil L.R. 17.1(b)(4)(b)
6 establishing the trust.

7 **Conclusion**

8 For the reasons set forth herein, the Court GRANTS IN PART AND DENIES in part
9 Plaintiff's motion to strike the Vandevelds' lien for attorneys fees in costs. The Vandevelds have
10 a valid lien for \$1,854.63 in costs, but otherwise are not entitled to any attorneys fees for their
11 services in this case. The Court GRANTS Plaintiff's motion to approve the settlement and to
12 establish a Special Needs Trust. The Court will separately enter an order establishing the Special
13 Needs Trust.

14 **IT IS SO ORDERED.**

15 **DATED: May 12, 2010**

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17 **IRMA E. GONZALEZ, Chief Judge**
18 **United States District Court**
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